Spencer, Samuel
Vital points in railway rate regulation

VITAL POINTS
IN
RAILWAY RATE REGULATION.

An Address Delivered by SAMUEL SPENCER Before
The Board of Trade of the City of Newark,
October 11, 1905.

Mr. President and Members of
The Board of Trade of the City of Newark:

You have invited a discussion of an economic and industrial question of the utmost current importance, and it is with a sense of responsibility that I have accepted your invitation to take part in it.

The problems of transportation and of the prompt adjustment of rates to the ever changing conditions and necessities of our rapidly developing industries and trade, both foreign and domestic, have been in the past, and will be in the future, one of the controlling factors in the maintenance of our commercial prosperity, which under the existing system has grown to a position of world supremacy.

No one influence has contributed more to this prosperity than the fact that the channels of trade and commerce, through which our producers and manufacturers have reached a market, have heretofore been free from the cumbersome, dilatory and retarding methods of governmental control, which in other countries have stifled progress and contributed materially to the continuance of high rates.

Up to the present time shipper and carrier have been free to work together without political interference, to facilitate the establishment and development of new industries; to reach out for new markets for our farmers and manufacturers; to create new communities and maintain the prosperity of those already established; and to co-operate to the fullest possible extent to enlarge the volume of both our domestic and foreign trade.

It is now proposed to change this system, and substitute for it one in which artificial and bureaucratic methods will take the place of the natural laws of trade and commerce which have been the controlling force in the evolution of the present system.

It requires no special effort of the imagination to conceive the far-reaching evils and sectional controversies which such a system would entail.

And it must be borne in mind that it is proposed to give these enormous powers to a body on whom no responsibilities rest or can rest for the preservation or maintenance of the rail-

road property or for the discharge of its financial obligations, or the fulfilment of its duties to the public as an efficient common carrier.

If it were proposed that the government should acquire the ownership of all the railroads of the country, and assume the responsibility for their operation and management, the payment of their obligations and the protection of the capital invested, entirely different questions would arise. But that is not the plan proposed by the legislation now being urged. It is proposed to grant power over the earning capacity without imposing corresponding responsibility for the necessary expenses, and risks of conducting the business.

Neither the public safety nor the public welfare can be protected by substituting such a system for the one under which the railroads of this country are now operated, and under which the people at large have the best service at the lowest rates of any country in the world.

The immediate question is whether private property, even though it be employed in quasi-public service, shall continue to be controlled and directed in its most vital commercial features by those who own it, subject always to the requirements of justice and the common law, or whether governmental agencies shall be granted power of control beyond the limit of wise and wholesome governmental supervision and regulation.

Much light has recently been thrown upon the subject, and the wisdom of searching and deliberate investigation and careful and prudent thought has been immensely emphasized by the courageous determination of the Senate not to be stampeded by popular clamor upon a subject of vital importance to the principles of our government and the welfare of American industry and progress. The investigation by the Senate Committee has enabled us to discuss it upon its merits, in the light of facts clearly ascertained and fully set forth to the public.

If there is to be legislation, and I do not deny its desirability, it is a platitude to say that it should be enacted in the light of past experience and the facts as they exist, and should be aimed at real, not imaginary, evils, and should be so framed as to secure direct and tangible remedies, with the minimum derangement of established conditions of industry and prosperity.

If the necessity for governmental rate-making exists, the reasons therefor certainly should have been made evident before

Congress by witnesses representing the substantial, industrial and commercial interests affected by such necessity. Such evidence is conspicuously absent, and I challenge a thorough reading of the voluminous testimony taken before the Committees of the House and Senate for a contradiction of this statement.

Upon the contrary, the representatives of the commercial and industrial interests of this country now so prosperous and thriving, were substantially unanimous in the view that rates as made under existing conditions are in the main as satisfactory as could be expected under any method of procedure, and that a change from rate-making by the responsible managers of the properties to rate-making by a governmental tribunal is not only undesirable, but would prove dangerous, if not vicious.

Let us review very briefly the claims of those who advocate conferring even a limited rate-making power upon the Interstate Commerce Commission. The advocacy comes under the misleading guise that it is not the power to make rates which is claimed, but the right to revise existing rates when unreasonable or unjust ; that is, that the power to make initial rates or schedules shall not be granted, but only the power to revise an existing rate. Initial rate-making can scarcely be said to exist any longer in this country. The naming of a new rate must almost invariably be the revision of an existing one, and the right to revise one is necessarily the right to revise all. Therefore, to grant to the Commission the right to revise one rate is to grant the right to make any and all rates in the sense that rates are now made.

The necessity for granting the power to a government tribunal to revise a rate adjudged to be unreasonable or unjust must in reason presuppose that unreasonable or unjust rates exist. The most widespread invitation to the public upon the part of the Senate Committee to produce the evidence of such unreasonableness or unjustness, failed to find witnesses who even claimed, except in a very few specific instances, that such unreasonableness or unjustness existed. These few cases are infinitesimal in number and importance when compared with the millions of rates in force upon 210,000 miles of railway, the number and complexity of which may be fairly indicated by the fact that the Interstate Commerce Commission in eighteen years has had filed with it about 2,400,000 tariffs, and

that the number now filed averages something over 100,000 per annum.

During the eighteen years of its existence the Commission has received a total of about 4,000 complaints. Of these about 3,200, or 80 per cent., were either not entertained or were disposed of without formal hearing or record. Of the remaining 800, or 20 per cent., almost if not quite half have been settled by agreement or by withdrawal of complaint. The Commission has rendered about 360 decisions, or only about 20 per annum since its organization.

Only 194 of these decisions, or somewhat more than one-half, were in favor of the complainants, and in about two-thirds of these the orders of the Commission were promptly complied with by the carriers.

In only 45 cases, or about one and one-tenth per cent. of the total complaints, in eighteen years, has the divergence of view between the Commission and the carriers been sufficiently wide to cause resort to the courts for final adjudication of the issues. Of these 45 cases, some have been dismissed; others have not been vigorously pressed for trial. The number which have been decided is 34, and in only three of these have the findings of the Commission been sustained by the courts.

Do these facts indicate such culpability upon the part of the carriers, or such lack of usefulness and power within its proper sphere upon the part of the Commission, as to call for the enactment of the doubtful and dangerous legislation which has been proposed?

The advocates of such legislation have based their claims, so far as they have been made specific, upon the necessity for:

(a) preventing rebates and other secret and illegal discriminations in favor of certain shippers;

(b) the removal of discriminations between localities;

(c) expediting decisions in contested cases.

And upon allegations;

(d) that since 1899 rates have been materially increased by changes of classification or otherwise;

(e) and that such legislation will merely restore to the Interstate Commerce Commission a power which it previously had.

The hearings before the Committee of the Senate, and the subsequent consideration and discussion of the subject by the public press, have cleared away much of the confusion upon these points.

Rebates:

The President in his last annual message laid special emphasis upon the necessity for doing away with rebates, and for the keeping of the highways of transportation open to all upon equal terms. There is no issue or controversy before the people or Congress as to whether or not rebates or secret discriminations should be stopped. No one desires more than the railway managers themselves that there should be an end to all such practices. They are as detrimental to the transportation interests as they are to the great body of shippers.

No rational suggestions have been made, however, as to how the granting of rate-making power to the Interstate Commerce Commission could be effective to this end. A rebate or any secret discriminatory device can, of course, be applied to a government made rate as well as to one made by the carrier.

In fact a rate established by the Commission, and thereafter unalterable by the carrier in reduction or otherwise, except upon petition to the Commission, instead of serving as a cure or a preventive would be a distinct incentive towards secret reduction when commercial conditions demanded and a public and legal reduction could not be promptly made.

It has been clearly established, however, by testimony from shippers and it has been admitted by members of the Interstate Commerce Commission, that the evil of rebates and similar secret discriminatory devices no longer exist to any appreciable extent.

So far as they do exist, the existing laws, if vigorously executed, are ample for their detection and correction. The Chairman of the Commission has borne testimony as to the adequacy of the Elkins' law in respect to this phase of regulation. Not one piece of evidence was submitted to the Senate or House Committees, showing the existence of rebates and, notwithstanding the emphasis laid upon this evil in the President's message, not a single bill was presented at the last session of Congress which specifically provided in any way for their abatement.

If there be discriminations between individuals in the matter

of allowances for private side-tracks or industrial or terminal railways or in the use of private cars, or by any other device, the exact character and extent of such abuses, should be thoroughly investigated, and if needs be, appropriate and specific legislation should be enacted in remedy, by increasing the powers of the Interstate Commerce Commission in respect thereto, or by any other measure which will prove effective. Such abuses, however, have by no means been proven to any material extent, and at the last session of Congress there was but one bill introduced providing for their correction, and it was allowed to rest undiscussed in committee.

Discriminations Between Localities:

Under this head may be classed probably the largest number of complaints now made to the Interstate Commerce Commission and to Congress. The enormous area of the country, the wide diversity of agricultural, industrial and commercial interests of the different sections, and the intense rivalry between them, the enormous complexity of the rate problem upon the 210,000 miles of railway, operated by over 2,000 different corporations, render complaints of discriminations between communities inevitable under any conditions of railway rate-making.

For the purposes of this discussion, however, the only material question is whether the alleged discriminations will be done away with, the complaints be diminished, and the commercial advantages of the different sections be advanced by granting to the Interstate Commerce Commission the right to revise rates, and thus to adjust through this tribunal the relative rates as between rival communities. The existing adjustment of rates between different localities, and for different classes of traffic, is the result of industrial and commercial contests between communities, the competitive struggles not only between the railways, but between numerous water lines, and the conditions of domestic and foreign markets. This adjustment rests upon a basis so complicated, that the disturbance of it at one point must almost necessarily create disturbance at numerous others. Is it possible, then, for any single tribunal sitting in Washington to decide upon the revision or readjustment of relative rates, with such wisdom and comprehension as not to create a hundred complaints in their efforts to remove one? The very fact that a governmental

tribunal had the right of revision or readjustment of relative rates between communities would necessarily be a breeder of complaints innumerable.

Expediting Decisions:

It has been claimed from many sources, some high in authority, that the necessity for expediting decisions in case of complaints to the Commission constitutes one of the chief reasons for additional legislation granting to the Commission the power to revise and name rates and make them effective, prior to review by Court.

This view is founded apparently upon lack of information as to where delays have occurred or a misapprehension as to their causes.

The chief delays complained of have undoubtedly been with the Commission and not with the Courts.

The Commission has had presented to it in eighteen years about four thousand complaints, many requiring prolonged investigations and hearings, and in addition to the time consumed thereby much additional time must have been required to dispose of the thirty-two hundred complaints in which there were no formal hearings and no record. In the same period the United States Courts, with its twenty-nine Circuit Judges and seventy-eight District Judges, have been required to review but forty-five cases.

The Commission has rendered two hundred and ninety-seven formal decisions. The United States Courts have finally decided thirty-four. The Commission has pending before it in the neighborhood of seventy cases, and the Courts had pending at the date of the Commission's last report, five cases for the enforcements of the Commission's orders. It has never been claimed that the Interstate Commerce Commission has not been fully employed. It cannot be claimed from this record that the Court dockets have been clogged by cases arising under the Interstate Commerce Act.

It is not difficult from this to draw fairly accurate conclusions as to where delays are likely to have occurred, or as to what would be the result in point of delay if power should be granted to the Commission to prescribe and make effective future rates even upon complaint and hearing only.

We need not go far afield to find specific instances of long

delays in the hearings and findings of the Commission. In the Hay case the rate was advanced by the carriers on January 1, 1900. The Commission condemned the rate as unreasonable in October, 1902. In the Soap case the rate was advanced January 1, 1900, and it was not until April, 1903, that the Commission condemned it. It then waited a year and three months longer before bringing the suit for the enforcement of its findings, making four years and six months from the time the advance took place before the Court had the opportunity for review. The lumber rates from the south to the Ohio River were advanced in April, 1903. Complaint was filed with the Commission in June, 1903, but no decision in respect thereto was rendered by the Commission until February, 1905.

Most of the delays which have been complained of antedated of course the passage of the Elkins Law in 1903.

One of the chief purposes of that law was to expedite hearings and decisions in contested cases against the carriers, and this would be one of its greatest benefits if the swift procedure there provided should be utilized.

It provides, whenever the Commission shall be satisfied that the carriers have been guilty of illegal acts, whether in the form of rebates, or unjust discriminations, or the charging of unreasonable rates, the case may be carried forthwith to the Circuit Court, injunction obtained if necessary to protect complainants, and the case advanced on the docket for early hearing in preference to all except criminal cases.

This process is as summary as court action can be made consistent with due process of law. If the action relates to a rate which is adjudged to be unreasonable or unjust, the finding of the Circuit Court is sufficient to put the revised rate into effect, and it continues in effect pending any appeal to the Supreme Court.

This not only avoids, if the Commission so chooses, the long, tedious and frequently ineffective hearings before that body, but it limits the carrier in cases of contested rates to trial in one court before the rate decision becomes effective, and provides that that trial shall have precedence over all others except criminal ones.

It is a remarkable fact that this expeditious and effective machinery has never yet been utilized, both the Commission and the advocates of the proposed legislation ignoring ap-

parently its existence, in their efforts to secure enlarged powers for the Commission.

The desirability of prompt decisions of all complaints must be conceded in the interest of both the public and the carriers. It is not apparent, however, how time is to be saved by substituting a hearing before the Commission for a trial of the case by the Circuit Court, when in either case no further appeal can be used to stay the rate from becoming effective upon proper order, and when the case in the Court takes precedence of all except criminal cases upon the docket.

Trial and order by Court can in fact be made more prompt than a hearing by Commission; there are numerous Courts and only one Commission, and there is the further advantage that the Circuit Court's order as to the rate becoming effective is final. An order of the Commission would be subject to possible reversal by Court.

Alleged Increase in Rates:

It has been claimed that rates have been largely raised during the past few years by changes of classification or by increase in the rates themselves. While some specific cases of increased rates alleged to be unjust have been cited in the testimony now before Congress, they have not been numerous. The chief support of the claim has been the slight increase of less than four-tenths of a mill per ton per mile on the average tonnage of the entire country from 1899 to 1903 as shown in a response by the Interstate Commerce Commission to a resolution of the Senate, now on record as Senate Document 257. The weakness and fallacy of the arguments there presented have been so thoroughly exposed before the Senate Committee that I need say only a word to emphasize the injustice of asking for large and dangerous increase of power to the Interstate Commerce Commission upon such a plea. In the first place, a resolution of inquiry was introduced in the Senate, calling upon the face of it for a one-sided answer from the Commission. The resolution, before passage, was amended so as to call for a statement of facts much more comprehensive and useful from the Commission's records. The resolution as amended and passed was not fully answered. The answer of the Commission purported to show that the increased revenues to the carriers in 1903 as compared with 1899, by reason of the increased rates,

was $155,000,000. In the first place, the slight increase of less than four-tenths of a mill per ton per mile in 1903 as compared with 1899, an increase of only about five per cent., was not the result entirely of increased rates, but was largely the result of an increased movement of high-class freights as compared with low-class freights. Apart from this, the increase of less than four-tenths of a mill properly applied to the tonnage figures of the Interstate Commerce Commission according to its own report, figures which were in its possession when its statement was made, would show an increased revenue to the railways for like service of only $67,000,000 instead of $155,000,000. These are the figures which the document should have contained from the records of the Commission, instead of the figures which were presented, and even then the response would have been only partial. It is well known that the prices of labor between those years increased from ten to fifteen per cent., and the prices of many of the chief materials consumed by the railways in the maintenance and operation of their properties increased twenty-five or thirty per cent. or more.

Against these radical advances in the expenses of the railroads there was an increase of but five per cent. in their ton mile revenue.

If the inquiry had been fully answered, as to net as well as gross earnings, it would have appeared that, considering the effect of these largely increased expenses, the net returns to the owners of the railways were relatively less per unit of traffic in 1903 than in 1899.

It is a notorious fact that, during the entire history of the American railways, the general tendency of rates has been downward, and that their rates are now far lower than those of any country of the world.

For some reason the year of the lowest average, 1899, was taken as the basis of comparison.

If the average for 1903 had been compared with that of 1894, or '95, or'96, three years of great depression in American industry, a decrease and not an increase would have been shown.

The Interstate Commerce Commission in its Report for 1903 has said:

"When reductions have been made on account of commercial depression, it is difficult to see why corresponding advances may not properly be made with the return of business prosperity."

The argument is therefore certainly specious which would claim under such conditions that the making of rates by the railways threatened oppression to the public, or called for such legislation as has been suggested.

Restoring Powers Previously Enjoyed:

It has been repeatedly asserted by the Commission and its members and before Congress that granting the power to the Commission to name, and to make effective, rates as provided for in the proposed legislation, will be merely restoring a power granted under the Act of 1887, and exercised by the Commission for ten years thereafter.

The only evidence adduced in support of this statement has been the repeated assertions of the Commission and its members, and the citation of cases in which prior to the decision of the Maximum Rate Case in 1897, the Commission condemned certain rates as unreasonable or unjust or discriminatory, and ordered other rates substituted therefor, and that in some cases such rates became effective without contest in the courts. That this is no evidence of the exercise of such power as is claimed is abundantly proven by the simple fact that the carriers themselves, not the Commission, put the rates into effect in the cases cited, and that the carrier declined frequently during the same ten years to accept in other cases similar findings and orders of the Commission, but on the contrary contested them in the Courts, and in most cases successfully. That the decision in the Maximum Rate Case marked no material change in conditions in this respect, is also clearly established by the fact that since 1897 the percentage of cases in which the carriers have acquiesced in similar findings of the Commission has been greater than the percentage of such acquiescence prior to that year.

The debates in Congress prior to the passage of the Interstate Commerce Act in 1887 show clearly and conclusively that the specific question was then presented as to whether it was the intention to confer in any form, or to any extent, a future rate-making power upon the Commission, and the view was clearly expressed and prevailed that there was no such intention upon the part of the framers of the Act. Judge Cooley, the first Chairman of the Commission, distinctly stated after entering upon his duties, and in officially interpreting the Act, that it granted no such powers, and at the

recent hearings before the Senate Committee, Senator Cullom, one of the fathers of the Act, distinctly stated that there was never any such intention upon the part of Congress at the time of its enactment. It is astounding under these circumstances, and with this conclusive proof to the contrary, that the claim has been so persistently made that the Courts have stripped the Commission of powers once granted or intended to be granted, and that the efforts in behalf of the recently proposed legislation were for the purpose of merely restoring what had once existed.

One of the most serious objections to the legislation proposed is that under it a rate once fixed by the Commission would continue in force indefinitely, unless changed by the Commission or by Court. The carrier would thereafter have no power to make either reductions or increases to meet new conditions. Under such a law all rates would in time become Commission's rates, and the functions of railway managers in making adjustments to meet the exigencies of commerce and in extending the sphere of usefulness of the transportation system of the country would, step by step, come to an end. Slow but steady paralysis would creep into the industrial arteries through which the blood of commerce flows, and the transportation system would gradually become numb and rigid; the present activity of railway managers would be largely eliminated as an agency in the intelligent development of the resources of the country. All rates would soon be machine-made only, and commercial and industrial centers now acknowledging no bounds for the ultimate distribution of their products would find themselves operating in narrower and narrower zones finally circumscribed by governmental edicts as to where their wares should go.

It, therefore, appears that the reasons assigned for giving the Commission power to make or revise rates are largely without foundation. Certainly they fall far short of constituting a justification for the risks of such far reaching evils as lurk in the proposed legislation.

But even if the reasons assigned were true, the plan of conferring upon the Commission the power to make or revise rates and make them effective prior to review by Courts, would still be open to the decisive objection that it is necessarily unjust to the railroads, and opposed to the fundamental principle of Anglo-Saxon jurisprudence that rights of property

and persons shall be enforced and protected according to due process of law.

The courts are constituted for the purpose of being fair and impartial. They are a separate department of the Government. The judges exercise neither executive nor legislative functions, but purely judicial functions. They have nothing to do with the preparation or the prosecution of the cases which come before them. The whole machinery is created and adjusted to the end that the controversy shall be decided by a tribunal that has absolutely no relation to the case except that of an umpire, removed from all influences which might impair the impartiality of the decision.

No controversy affecting property can be more vital, not only to the owner, but to the general welfare of the country, than one respecting the rates which a railroad may charge. Yet how different from the settled plan of due process of law which is guaranteed to all, is the plan proposed for determining this most vital question?

Virtually there is not a single respect in which the Interstate Commerce Commission resembles a court. It has extensive administrative duties to perform. It is required also to investigate, to hear and to institute complaints, and to prosecute offenders against the Act to Regulate Commerce. In other words, besides its numerous other functions, it is a sort of railroad grand jury. In the courts of the country a grand jury cannot try a case which it has investigated and inaugurated, and no member of the grand jury can sit upon the jury which tries the case. The Commission which investigates offenses and initiates prosecutions may and does in addition sit in judgment upon some cases which have been the subject of the investigation and prosecution. In other words, the plaintiff in the litigation is the judge that tries the case. All such features are utterly foreign to courts, and they are utterly incompatible with an impartial attitude. Why should one class of property be discriminated against and be denied the protection of established procedure when all other property interests have the full benefit of the untrammeled judgment of the duly constituted courts.

It may be said, however, that it is proposed that the rates made or revised by the Commission shall be subject thereafter to the action of the Court. According to the plan proposed, the rates made by the Commission become effective pending

review by the courts. In other words, this argument, while involving an admission that the railroads are entitled to a judicial trial, makes the remarkable demand that they shall be convicted before their trial can begin, and stand convicted, and suffer the penalties of the conviction during the trial. Surely, if the railroads are entitled to a trial in Court, they are entitled to that trial before penalties are enforced. A judicial trial, to be effective, must take place before, and not after, condemnation and punishment.

To place in the hands of one tribunal which is or may be prosecutor, jury and judge, the power at the same time to be executioner is equivalent to providing by statute for the enforcement of commercial lynch law.

Whatever may be decided as to the necessity for additional regulation of railroads, motives of fair play, as well as expediency, should conclusively require that the railroads can have the same fair and impartial trial before the courts constituted in the ordinary way as is accorded to all other property.

In avoiding unjust discriminations upon the part of the railroads, let us hope that there will not be that unjust discrimination upon the part of the Government which will deny to the railroads the same judicial protection that is accorded to all other property and persons.

October 6, 1905.